Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JAVIER LOPEZ CANTU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

CHRIS FLOOD
FLOOD & FLOOD
914 Preston, Suite 800
Houston, Texas 77002
(713) 223-8877

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. WHETHER THE FIFTH CIRCUIT'S DECISION TO AFFIRM THE TRIAL COURT'S REFUSAL TO CONDUCT AN EVIDENTIARY HEARING TO DETERMINE WHETHER EXTERNAL INFLUENCE WAS PLACED UPON THE JURY DURING DELIBERATIONS, AFTER A FINDING THAT ONE OF THE JURORS HAD BEEN OFFERED A BRIBE TO RETURN A VERDICT OF NOT GUILTY, IS A VIOLATION OF PETITIONER'S RIGHT TO DUE PROCESS UNDER THE UNITED STATES CONSTITUTION.

2. WHETHER THE FIFTH CIRCUIT'S DECISION TO AFFIRM THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL, AND MOTION FOR MEANINGFUL ACCESS TO THE JURORS WITHOUT A HEARING VIOLATED PETITIONER'S SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY, REQUIRING THIS COURT TO EXERCISE ITS SUPERVISORY POWER.

3. WHETHER THE FIFTH CIRCUIT'S DECISION TO AFFIRM THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL AND MOTION FOR MEANINGFUL ACCESS TO THE JURORS WITHOUT A HEARING, WAS AN ABUSE OF DISCRETION AND IN CONFLICT WITH THIS COURT'S DECISION IN *REMMER V. UNITED STATES*, 347 U.S. 227, 74 S.CT. 450, 98 L.ED. 654 (1954), AND *SMITH V. PHILLIPS*, 455 U.S. 209, 102 S.CT. 940, 71 L.ED.2D 78 (1982).

4. WHETHER THE FIFTH CIRCUIT'S AFFIRMATION OF THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR NEW TRIAL AND PETITIONER'S MOTION FOR MEANINGFUL ACCESS TO THE JURORS AFTER THE VERDICT WITHOUT A HEARING WAS AN ABUSE OF DISCRETION

QUESTIONS PRESENTED – Continued

AND IN CONFLICT WITH THE PRIOR DECISIONS OF THE FIFTH CIRCUIT IN *UNITED STATES V. SYLVESTER*, 143 F.3D 923 (5TH CIR. 1998); *UNITED STATES V. DENMAN*, 100 F.3D 399 (5TH CIR. 1996); *UNITED STATES V. JOBE*, 101 F.3d 1046 (5TH CIR. 1996); *UNITED STATES V. SANCHEZ-SOTELO*, 8 F.3D 202, 212 (5TH CIR. 1993); *UNITED STATES V. WEBSTER*, 750 F.2D 307 (5TH CIR. 1984); *LLEWELLYN V. STYNCHCOMBE*, 609 F.2D 194 (5TH CIR. 1980); *UNITED STATES V. WINKLE*, 587 F.2D 705 (5TH CIR.), CERT. DEN., 444 U.S. 827, 100 S.CT. 51, 62 L.ED.2D 34 (1979); AND *UNITED STATES V. CHIANTESE*, 582 F.2D 974 (5TH CIR. 1978).

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CITATIONS OF OPINIONS IN THE CASE

United States of America v. Cantu; No. 97-40930 in the United States Court of Appeals for the Fifth Circuit; United States District Court No. B-97-CR-20.

STATEMENT OF JURISDICTION

The trial court had jurisdiction because Petitioner was indicted for violations of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 1956. The opinion of the United States Court of Appeals for the Fifth Circuit affirming Petitioner's conviction was entered on February 3, 1999. (Appendix A). On February 17, 1999 Petitioner filed a Petition for Rehearing and a Suggestion for Rehearing En Banc. The Order denying Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was filed March 2, 1999. (Appendix B). This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgement on petition for certiorari rests upon 28 U.S.C. § 1254(1) and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS

ARTICLE [V] – FIFTH AMENDMENT

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE [VI] – SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On February 3, 1997, Petitioner was charged in a nine-count indictment with violations of 21 U.S.C. §§ 841, 846 and 18 U.S.C. § 1956.

The trial began on April 18, 1997 and concluded on April 26, 1997. On that date at approximately 8:50 a.m., counsel was brought to the District Court's chambers, where Juror James Almaraz was present before the Court, the prosecutor, and the court reporter. The jurors had already deliberated for one day and Juror Almaraz reported an incident wherein he had been approached the evening before by an individual named Rene DeLaRosa. Juror Almaraz, through questions by the Court, gave a detailed account of an attempt by Mr. DeLaRosa to tamper with the juror's decision. Juror Almaraz stated that Rene DeLaRosa *informed him that the Defendant was guilty*

of the charges, but that if Juror Almaraz would vote not guilty, then an economic benefit would be given to him. Juror Almaraz also informed the Court that his girlfriend had been approached at work by another individual who had made a similar offer. Specifically, Juror Almaraz's girlfriend informed him that one of her co-workers sent a message asking Juror Almaraz to vote for Defendant's innocence, and that the girlfriend would receive some money.

The Court excused Juror Almaraz, and proceeded to allow the jury to continue deliberations with only eleven jurors, over defense counsel's objection. Both parties then agreed to ask the Court to make an individual inquiry of the remaining jurors about whether they had been exposed to any external information, including but not limited to whether any attempts had been made to tamper with the remaining jurors or whether the jurors had been informed that Defendant was guilty of the alleged charges or if Juror Almaraz had informed the remaining jurors of the attempted bribery. The Court denied both parties' request to interview the remaining jurors.

The jury returned a verdict and counsel for Defendant requested access to the jurors to interview each individual juror to determine if there were any outside influences injected into the deliberations, which the Court denied.

On May 5, 1997, counsel for Defendant filed a motion for new trial, alleging that Defendant was denied his right to a fair trial pursuant to the Sixth Amendment to the United States Constitution, due to the Court's denial of a motion for mistrial after the jury tampering incident was revealed, and by refusing Defendant's counsel access

to the remaining eleven jurors to determine whether there had been any attempts to tamper with them or if they had been told during deliberations of the attempt to bribe Juror Almaraz. Counsel also filed a Motion for Meaningful Access to the Jurors in an attempt to determine the extent of the external evidence exposed to the jurors, which was also denied.

On July 15, 1997, Defendant was sentenced to 360 months in the custody of the Bureau of Prisons and a supervised release term of five (5) years on Count One, and 240 months in the custody of the Bureau of Prisons and a supervised term of three (3) years on Count Nine, to run concurrently. (Appendix B)

Petitioner timely gave notice of appeal and on April 29, 1998 filed his brief in the United States Court of Appeals for the Fifth Circuit.

Petitioner's conviction was affirmed by a panel of the Fifth Circuit on February 3, 1999 (Appendix A).

On February 17, 1999 Petitioner filed a Petition For Rehearing and a Suggestion For Rehearing En Banc, pointing out to the panel and the entire court that the trial court had not conducted a hearing with all parties present wherein Juror Almaraz reported he had not talked to any of the other jurors about the bribery attempt or conducted a hearing to determine whether any of the other jurors had been tainted by external evidence after a showing of an attempt to bribe at least one juror.

The Fifth Circuit Court of Appeals denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc on March 2, 1999. (Appendix C).

ARGUMENT

This Court explained the proper procedure for handling investigations of jury tampering in *Remmer v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954). In *Remmer*, like in this case, a juror was approached by a third party offering a bribe in exchange for a favorable verdict. The juror declined the offer, but *ex parte* with the trial judge was later interviewed by the FBI. The judge concluded the juror was unbiased, and the defendant was convicted. This court vacated the conviction, holding that a trial court should not take final action *ex parte* but "should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate." *Id.* at 229-30, 74 S.Ct. at 451.

The Fifth Circuit Court of Appeals in *United States v. Winkle*, 587 F.2d 705 (5th Cir.), cert. den., 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979), and *United States v. Howard*, 506 F.2d 865 (5th Cir. 1975) stated:

> Where a colorable showing of extrinsic influence appears, a court must investigate the asserted impropriety:
>
> The evidentiary inquiry before the district court . . . must be limited to objective demonstration of extrinsic factual matter disclosed in the jury room. Having determined the precise quality of the jury breach, if any, the district court must then determine whether there was a reasonable probability that the breach was prejudicial to the defendant. . . . " *Winkle*, 587 F.2d at 714; *Howard*, 506 F.2d at 869.

To put it simply, once a finding of juror tampering has been found, the District Court must conduct a hearing to determine the quality of the breach. In the present case, the questioning of Juror Almaraz was insufficient to determine the "precise quality" of the jury breach because there were no questions asked about whether he had told the other eleven jurors and there was no questioning of the other jurors. Therefore, the questioning of the District Court was insufficient under both *Remmer* and the Fifth Circuit standard.

The Fifth Circuit has also adhered to the strict rule of law that when the possibility of outside influence on the jury arises, "the failure to hold a hearing in such situation constitutes an abuse of discretion and is reversible error." *United States v. Denman*, 100 F.3d 399, 405 (5th Cir. 1996); see also *U.S. v. Sylvester*, 143 F.3d 923, 932 (5th Cir. 1998).

Furthermore, the panel for the Fifth Circuit misunderstood the state of the record. Counsel and Petitioner were not present for any questioning wherein juror Almaraz reported that he had not talked to any of the other jurors about what had occurred.

Beginning on page 1479 of volume 7 of the transcript of trial proceedings, the court began questioning Juror Almaraz with both attorneys present. A complete review of the court's interview of Juror Almaraz continuing until page 1492 reflects no indication that Juror Almaraz had not reported the impermissible extraneous influence to the remaining eleven jurors. Beginning at page 1497, the court allowed counsel for the government and counsel for Petitioner to question Juror Almaraz; counsel for Petitioner was cut short. Counsel for Petitioner was not

allowed to question Juror Almaraz about whether he related the alleged bribery attempt to the remaining eleven jurors. A careful reading of pages 1497 through 1502 does not support the panel's finding on page 3 of the opinion, wherein it states: " . . . Almaraz i dicated that he had not been approached prior to the night before he reported the incidents to the court *and had not talked to anyone about what had occurred.*" It further does not support the panel's finding on page 5 of the opinion: " . . . it was not necessary to voir dire the remaining jurors because Almaraz had told no other member of the jury about the incidents, . . . "

Later, at page 1509, at the request of both the attorney for the government and attorney for Petitioner, the trial judge took the bench and the parties made a joint request to question each of the remaining jurors individually to determine if they had been subjected to impermissible extraneous influence or been told by Juror Almaraz of the attempts to influence him. That request was denied before the guilt-innocence verdicts by the jurors. (Vol. 7, p. 1509, l. 3-9).

The District Court further abused his discretion when he denied Petitioner's Motion For New Trial without a hearing, once again failing to properly investigate where a colorable showing of extrinsic influence had appeared. *U.S. v. Sanchez-Sotello*, 8 F.3d 202, 213 (5th Cir. 1993). The trial court's denial of Petitioner's post-verdict request for a hearing by way of his Motion For New Trial and Motion For Meaningful Access to the Jurors deprived Petitioner of his right to an evidentiary inquiry by the District Court wherein the court determines the quality of the jury

breach, if any, and whether there was a reasonable probability that the breach was prejudicial to the defendant. *Winkle, supra,* 587 F.2d at 714; *Howard, supra,* 506 F.2d at 869.

As this Court stated in *Remmer, supra,* and the Fifth Circuit stated in *Winkle* and *Howard,* prejudice is assumed in the form of a rebuttable presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant. *Id.;* 347 U.S. at 229; 74 S.Ct. at 451.

The Fifth Circuit also misapprehended the record when the panel wrote:

> The hearing conducted by the district court was adequate to determine whether it was necessary to interview the remaining jurors. Almaraz indicated that the two incidents occurred the night before he reported them to the court and that he had not told anyone else about what had occurred. In light of these answers and in view of the potential disruptive effect of questioning all remaining jurors, the district court did not abuse its discretion in the way it handled the allegations of outside influence on the jury or in denying Cantu's motion for new trial. (Panel op. at p. 6)

There is nothing in the record to indicate that Juror Almaraz had not told the remaining eleven jurors about the incident. The "potentially disruptive effect of questioning all remaining jurors" was moot after the trial.

CONCLUSION

The trial court abused its discretion in denying counsel for Petitioner access to the jurors. The trial court also abused its discretion in denying Defendant's Motion for New Trial and by failing to conduct an evidentiary hearing to investigate a colorable claim of prejudicial extrinsic jury influence. The denial of Petitioner's petition for Rehearing and Suggestion for Rehearing En Banc was improper. The ruling of the Court of Appeals is contrary to prior rulings of this court, prior rulings of the Fifth Circuit, and is violative of Petitioner's rights under the Fifth and Sixth Amendments to the United States Constitution. This petition should be granted.

Respectfully submitted,

CHRIS FLOOD
FLOOD & FLOOD
Counsel of Record for Petitioner
914 Preston, Suite 800
Houston, Texas 77002
(713) 223-8877

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-40930

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAVIER LOPEZ CANTU,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Febr. 3, 1999)

Before SMITH, DUHÉ, and WIENER, Circuit Judges.

WIENER, Circuit Judge.

Defendant-Appellant Javier Lopez Cantu appeals his convictions for (1) conspiracy to possess 1,000 kilograms or more of marijuana with intent to distribute and (2) conspiracy to launder drug proceeds. He further challenges the jury's verdict of forfeiture of property under 21 U.S.C. § 853. For the reasons set forth below, we affirm both the convictions and the forfeiture verdict.

I.

FACTS AND PROCEEDINGS

In April 1995, Mark Miller was stopped by police for a routine traffic violation about 200 miles outside of Houston. When the police discovered that Miller was transporting approximately 200 pounds of marijuana, he agreed to cooperate with them.

The police disabled Miller's vehicle and instructed him to call the persons for whom he was delivering the marijuana and ask them for assistance. He did so, and approximately four hours later, Fabian Cavazos and the defendant-appellant's brother, Roy Cantu, arrived driving separate vehicles. The officers observed the two men transfer the marijuana into the newly-arrived vehicles, then arrested them. After Miller, Cavazos, and Roy Cantu identified defendant-appellant Cantu as the leader of the marijuana-distribution organization for which they worked, officials investigated and eventually arrested him. The government's evidence against Cantu at trial consisted largely of (1) testimony from some of his employees who had already pleaded guilty to narcotics offenses regarding Cantu's leadership role in a narcotics ring and (2) documentary evidence, such as phone records and ownership records of vehicles and residences, linking Cantu to the marijuana organization.

The jury convicted Cantu of the conspiracy charges, but acquitted him of the charge of possession of marijuana with intent to distribute. The jury also entered a verdict of forfeiture as to eleven properties.

On the morning of the second day of jury deliberations during the guilt-innocence phase of the trial, but

before the jury had begun that day's deliberations, a juror named James Almaraz reported to the court that the night before he had been approached by Rene De La Rosa regarding the trial. With the attorneys for both parties present, the district court held a hearing in chambers. In response to questioning by the court, Almaraz reported that he was approached by De La Rosa who stated that he was "real good friends with [Cantu] and he knows what [Cantu] does, but he just told me that he would appreciate if I would testify [sic] that [Cantu] was innocent." Almaraz also informed the court that one of his girlfriend's coworkers had passed a message to him through his girlfriend that, if he voted to acquit Cantu, the coworker would "give [him] some money." Almaraz indicated that he had not been approached prior to the night before he reported the incidents to the court and had not talked to anyone about what had occurred.

The district court allowed counsel for both parties to question Almaraz and then asked whether they would consent to the removal of Almaraz from the jury. Even though Cantu's attorney stated that he was not willing to consent to Almaraz's removal until he spoke to his client, the district court dismissed Almaraz immediately and then instructed the remaining jurors not to consider the excusal of the twelfth juror for any purpose.

After the jury returned its guilt-innocence verdicts and while it was deliberating on the forfeiture issue, Cantu requested permission to interview the remaining eleven jurors to determine whether any of them had been approached by anyone or whether any of them had heard of the incidents involving Almaraz. The district court

denied this request. Cantu later filed a motion and supporting memorandum, seeking meaningful access to the jurors. In these filings, Cantu's counsel asserted that he had learned from an unnamed source that one of the remaining jurors had been told that Cantu had been convicted of a drug trafficking offense on at least one prior occasion. Cantu repeated this assertion in the memorandum he submitted in support of his motion for a new trial. The district court denied both motions.

In addition to challenging the district court's handling of the failed jury tampering incident, Cantu asserts for the first time on appeal that the district court (1) through its questioning of particular witnesses, improperly created the impression that the court was partial to the government; (2) erred in admitting hearsay evidence; and (3) erred in permitting the eleven members of the jury who remained after the dismissal of Almaraz to render a verdict on the forfeiture issue, rather than dismissing the jury and granting Cantu an entirely new trial before a new jury, limited to forfeiture.

II.

ANALYSIS

A. Jury Tampering Incident

1. Standard of Review

We review a district court's determination that the jury was not improperly tainted by extrinsic evidence under the clearly erroneous standard,[1] and its choice of

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[1] *United States v. Kelley*, 140 F.3d 596, 608 (5th Cir.), *cert. denied*, 119 S. Ct. 247 (1998).

methods to investigate the possibility of extrinsic taint for abuse of discretion.[2] We also review a district court's denial of a motion for a new trial for abuse of discretion.[3]

2. Merits

Cantu asserts that the district court erred in (1) failing to conduct an evidentiary hearing to investigate whether the remaining jurors had been exposed to extrinsic influence; (2) refusing to grant Cantu access to the remaining jurors; and (3) refusing to grant Cantu's motion for a new trial.

"[T]he remedy for allegations of juror impartiality is a hearing in which the defendant has the opportunity to prove actual bias."[4] The district court is not, however, required to conduct a "full-blown evidentiary hearing in every instance in which an outside influence is brought to bear on a petit jury."[5] Here, in the presence of defense counsel and the prosecutor, the district court questioned Juror Almaraz in chambers regarding the two attempted tampering incidents that he had reported. Counsel for both parties were present throughout the hearing and were allowed to examine Almaraz. In light of his responses, the court determined that, although Almaraz

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[2] *United States v. Jobe*, 101 F.3d 1046, 1058 (5th Cir. 1996) (quoting *United States v. Roberts*, 913 F.2d 211, 216 (5th Cir. 1990)), *cert. denied*, 118 S. Ct. 81 (1997).

[3] *United States v. Freeman*, 77 F.3d 812, 815 (5th Cir. 1996).

[4] *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

[5] *United States v. Ramos*, 71 F.3d 1150, 1153 (5th Cir. 1991).

should be dismissed, it was not necessary to voir dire the remaining jurors because Almaraz had told no other member of the jury about the incidents, and no other juror had reported any such incident.[6]

The hearing conducted by the district court was adequate to determine whether it was necessary to interview the remaining jurors. Almaraz indicated that the two incidents occurred the night before he reported them to the court and that he had not told anyone else about what had occurred. In light of these answers and in view of the potential disruptive effect of questioning all remaining jurors,[7] the district court did not abuse its discretion in the way it handled the allegations of outside influence on the jury or in denying Cantu's motion for a new trial.[8]

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[6] *See United States v. Tarpley*, 945 F.2d 806, 811 (5th Cir. 1991) ("[I]t is not sufficient to trigger the requirement of further investigation that a juror have had [sic] contact with an outside source of information. Rather, the defendant must show that extraneous prejudicial material had likely reached the jury.") (citation and quotation omitted).

[7] *See Ramos*, 71 F.3d at 1153 ("In determining whether to conduct a hearing in a case such as this, the court must balance the probable harm resulting from the emphasis such action would place upon the misconduct and the disruption involved in conducting a hearing against the likely extent and gravity of the prejudice generated by the misconduct.").

[8] *See id.* at 1153-54; *United States v. Posada-Rios*, 158 F.3d 832, 876-77 (5th Cir. 1998).

B. Judicial Questioning

1. Standard of Review

Because Cantu did not object contemporaneously to the instances of witness interrogation of which he now complains, we review the district court's questioning of witnesses for plain error.[9] "Plain error occurs when the error is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings and would result in manifest injustice."[10]

2. Merits

That "[a] federal judge may comment on the evidence, question witnesses, bring out facts not yet adduced, and maintain the pace of the trial by interrupting or setting time limits on counsel" is settled beyond peradventure.[11] In so doing, however, a judge cannot appear to be partial to the prosecution.[12] When considering whether a court appeared impartial, we must review

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[9] *United States v. Mizell*, 88 F.3d 288, 297 (5th Cir.), *cert. denied*, 117 S. Ct. 620 (1996).

[10] *Id.*

[11] *United States v. Wallace*, 32 F.3d 921, 928 (5th Cir. 1994); see also Fed. R. Evid. 614(b) ("The court may interrogate witnesses, whether called by itself or by a party.").

[12] *United States v. Saenz*, 134 F.3d 697, 702 (5th Cir. 1998); *United States v. Wilson*, 135 F.3d 291, 307 (4th Cir.), *cert. denied*, 118 S. Ct. 1852 (1998); *Herman v. United States*, 289 F.2d 362, 365 (5th Cir. 1961) ("The trial judge has a duty to conduct the trial carefully, patiently, and impartially. He must be above even the appearance of being partial to the prosecution.").

the entire record.[13] Our task is to determine whether the judge's behavior was "so prejudicial that it denied the defendant a fair, as opposed to a perfect, trial."[14] "To rise to the level of a constitutional error, the district judge's actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor."[15]

Cantu asserts that reversal of his conviction is required because the district court's questioning "was pervasive, often leading, and designed to rehabilitate the credibility of government witnesses or undermine counsel for Defendant's questioning on cross-examination." Cantu rests his argument primarily on *United States v. Saenz*,[16] a case in which we held that the same district court's questioning of witnesses created an appearance that the court was partial to the prosecution and thereby denied the defendant a fair trial.[17]

In reaching our holding in *Saenz*, we emphasized that such a result obtained only because of the "unusual combination of circumstances" the case presented.[18] Most importantly, the government's case in *Saenz* rested almost entirely on the testimony of a codefendant who was

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[13] *United States v. Carpenter*, 776 F.2d 1291, 1294 (5th Cir. 1985).

[14] *United States v. Bermea*, 30 F.3d 1539, 1569 (5th Cir. 1994); *see also United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985).

[15] *Bermea*, 30 F.3d at 1569; *see also Davis*, 752 F.2d at 974.

[16] 134 F.3d 697 (5th Cir. 1998).

[17] *Id.* at 704-13.

[18] *Id.* at 699.

cooperating with the prosecution.[19] As a result, the outcome of the case hinged on whether the jury believed the testimony of the government's witness or that of the defendant, who – unlike Cantu – testified in his own defense. In light of the crucial nature of the testimony of these two witnesses and the scant evidence supporting conviction (other than the cooperating witness' testimony), we held that the district court's substantial questioning of both key witnesses in a manner that could have appeared to convey partiality toward the prosecution required that we reverse the defendant's conviction and remand the case for a new trial.[20]

The present case is distinguishable from *Saenz* in several key respects. First, rather than resting on the testimony of a single witness, the government's case against Cantu featured numerous substantive witnesses, including both coconspirators and law enforcement officials. Second, Cantu did not testify in his own defense, so the district court had no opportunity to question – let alone, improperly question – him.[21] Third, the district court's questioning of witnesses was not nearly as extensive as that in *Saenz*.[22] In sum, although the district

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[19] *Id.* at 702.

[20] *Id.* at 712-13.

[21] *See id.* at 709 ("This Court is particularly sensitive to a trial judge's questioning of the defendant, because [w]hen a defendant takes the stand in his own behalf, any unnecessary comments by the court are too likely to have a detrimental effect on the jury's ability to decide the case impartially.") (citation and quotation omitted).

[22] In *Saenz*, the district court's questioning of the government's cooperating witness consisted of over 18 percent

court's questioning in the present case may bear some similarity to that in *Saenz*, the unique combination of factors that led to a reversal in *Saenz* is absent here. We thus conclude that the district court's examination of witnesses did not constitute plain error.

C. Hearsay

1. Standard of Review

We review a district court's evidentiary rulings for abuse of discretion.[23] Should we determine, however, that the district court erred in admitting hearsay evidence, we must determine additionally whether the admission of the testimony was harmless.[24]

2. Merits

Cantu argues that on four occasions the district court erred in admitting hearsay evidence and that, when viewed cumulatively, the admission of this evidence was not harmless. Cantu first complains that the district court improperly admitted a government exhibit consisting of certified copies of public records from Hidalgo County, Texas, including court minutes reflecting a guilty plea by

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of his testimony – 264 out of the 1460 lines of transcript. *Id.* at 704 n. 3. The court's questioning of the defendant during direct examination made up 23.5 percent of the direct examination (253 out of 1075 lines). The court did not significantly interrupt the cross-examination or redirect of the defendant. *Id.* at 712 n. 7. In the present case, the district court's questioning of witnesses did not approach this level of intrusiveness.

[23] *United States v. Clements*, 73 F.3d 1330, 1334 (5th Cir. 1996).

[24] *United States v. Dickey*, 102 F.3d 157, 163 (5th Cir. 1996).

one Javier Lopez Cantu in a misdemeanor marijuana case. As a preliminary matter, Cantu did not object to the admission of the government exhibit on hearsay grounds. Rather, he objected only that the records were irrelevant because the government had failed to prove that the person identified in the records was the defendant, a separate contention from the one that Cantu raises on appeal.

Again, when a party fails to object to the admission of evidence, we review the district court's ruling only for plain error.[25] The district court's admission of the government exhibit in question did not constitute plain error – indeed, it did not constitute error of any sort. First, the certified court records are public records, thereby falling within the public records exception to the hearsay rule.[26] Moreover, to the extent that Cantu is arguing that the admissibility of the records was dependent on the fulfillment of a condition of fact – i.e., that Cantu was the person identified in the records – the district court only needed to determine whether the jury could reasonably find that the records referred to this Javier Lopez Cantu.[27] Not only do the documents refer to Cantu by his full

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[25] Fed. R. Evid. 103(d); *Peaches Entertainment Corp. v. Entertainment Repertoire Assocs., Inc.*, 62 F.3d 690, 694 (5th Cir. 1995); *see supra* text accompanying note 10.

[26] *See* Fed. R. Evid. 803(8); *United States v. Vidaure*, 861 F.2d 1337, 1340-41 (5th Cir. 1988) (holding certified and exemplified copies of defendant's convictions and copies of documents contained in his "pen packet" obtained from the Texas Department of Corrections were properly admitted in evidence under hearsay exception for public records and reports).

[27] *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988).

name, they reflect that Cantu was represented by Ed Cyganiez, an attorney who testified at trial that he represented Cantu in the present case and was hired by Cantu to represent his brother, Roy Cantu, on two other occasions. In light of this evidence, the district court did not err in finding that condition of fact was sufficiently established to admit the evidence.

Cantu next contends that the district court erred when it allowed his sister-in-law, Graciela Cantu, to testify that Cavazos worked for Cantu. Cantu's assertion is baseless. When defense counsel objected to Graciela Cantu's testimony at trial, the district court instructed the prosecutor to establish whether the witness had personal knowledge of Cavazos's relationship to Cantu.[28] Graciela Cantu then testified that she believed that Cantu was Cavazos's boss because she had personally observed Cantu giving Cavazos orders while they were unloading and storing marijuana in her house. That her testimony consisted of a conclusion about the relationship between Cantu and Cavazos, rather than a simple description of a concrete fact, does not render it inadmissible hearsay. "Personal knowledge can include inferences and opinions, so long as they are grounded in personal

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[28] *See* Fed. R. Evid. 602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Davis*, 792 F.2d at 1303-04 (holding officer's testimony that he personally knew when guns were released by police department was sufficient to establish testimony not hearsay given officer's "personal connection to subject matter").

observation and experience."[29] The district court did not err in permitting Graciela Cantu to testify that Cavazos worked for Cantu, given that her testimony was grounded in her personal observations of the interaction of these two men.[30]

Cantu also challenges the district court's admission of testimony by a Cantu employee, Alfonso Zaleta, describing a conversation among himself, Sergio Gomez, and Rafael Ornelas – the last two of whom are Mexican nationals – in which Gomez and Ornelas identified Cantu as a drug trafficker. According to Zaleta's testimony, Gomez and Ornelas demanded that Cantu pay, and Cantu agreed to pay, a $50,000 "tariff" to move marijuana through Matamoros. Zaleta's testimony thus established that there was a conspiracy among Cantu, Gomez, and Ornelas to move marijuana through Mexico into the United States and that Gomez's and Ornelas's statements regarding Cantu were in furtherance of that conspiracy – that is, to ensure that they were paid for sheparding Cantu's drugs through Matamoros. As coconspirator statements made in furtherance of a conspiracy are

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[29] *United States v. Neal*, 36 F.3d 1190, 1206 (1st Cir. 1994) (citation and quotation omitted), *cert. denied*, 117 S. Ct. 519 (1996).

[30] *See Lubbock Feed Lots, Inc. v. Iowa Beef Processors, Inc.*, 630 F.2d 250, 262-63 (5th Cir. 1980) (holding witness' testimony that he understood individual bought cattle for defendant based on fact that individual spoke to one of defendant's employees four or five times a day was sufficiently grounded in witness' personal knowledge).

admissible, the district court did not err in permitting Zaleta's testimony.[31]

Last, Cantu asserts that the district court erred in allowing Special Agent John Wood to testify, over Cantu's hearsay objection, that – based on statements made by Cavazos and Antonio Sepulveda, another of Cantu's employees – Wood believed that Cantu was aware that he was under investigation. The implication of Wood's testimony was that Cantu's awareness of the investigation explained why the police did not find significant quantities of drugs or drug ledgers when they searched Cantu's residence.

The government does not contest that Agent Wood based his testimony, at least in part, on information other than his own personal knowledge.[32] Neither does the government argue that Wood's testimony was offered for a purpose other than to establish the truth of the matter asserted, i.e., as background information to explain the actions of the investigators.[33] Rather, it contends that Agent Wood was an expert either in the investigation of Cantu's case or the search of Cantu's residence, and was thus permitted to testify regarding that search based on

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[31] *See United States v. Flores*, 63 F.3d 1342, 1377 (5th Cir. 1995).

[32] Although the government affixes the qualifier "in part" to its admission that Agent Wood based his testimony on hearsay, Wood did not so hedge his testimony, stating: "I believe [Cantu] did [know that he was under investigation], based on statements given by other people."

[33] *See United States v. Carrillo*, 20 F.3d 617, 619-20 (5th Cir. 1994).

any information that he discovered during the investigation. Significantly, the government neither requested that the district court qualify Wood as an expert nor laid any foundation for treating him as such.

Were we to approbate the government's theory, then any time that law enforcement officials have more than a tangential relationship to an investigation of a defendant, they would be permitted to testify to *any* conclusion they have reached, even when such a conclusion is based on the out-of-court statements of persons not before the court.[34] Although it is clear that there can be circumstances under which a law enforcement official can testify as an expert in a criminal case,[35] permitting an official to testify regarding a matter that requires no specialized knowledge[36] without requiring the government to lay

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[34] *See* Fed. R. Evid. 706 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.").

[35] *See, e.g., United States v. Gresham*, 118 F.3d 258, 266 (5th Cir. 1997) (ATF agent testified as expert that, based on, *inter alia*, discussions with manufacturers, corporate literature, and reference materials, components of firearm had been manufactured outside Texas and traveled through interstate commerce, thus establishing interstate commerce nexus required for conviction under 18 U.S.C. § 922(g)), *cert. denied*, 118 S. Ct. 702 (1998).

[36] Wood testified only that, based on "statements [he] was given by other people," Wood believed that Cantu knew he was under investigation. The agent did not testify that he believed that the search of Cantu's premises revealed no drug paraphernalia because Cantu was aware of the investigation –

any foundation regarding the witness' expertise in the subject matter, based on the simple fact that the official was involved in the investigation of the defendant, would raise serious concerns.[37] As we conclude, however, that, even assuming that Agent Wood's testimony constituted impermissible hearsay and opinions, the admission of his testimony was harmless, we need not determine whether the district court erred in admitting the testimony.

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testimony which, at a minimum, would have arguably relied in part on Wood's experience as an investigator; rather such a conclusion was simply a possible implication of his testimony. It requires no specialized knowledge – unless one characterizes knowledge obtained through hearsay statements as specialized – to testify that a person was aware that he was under investigation.

[37] *See United States v. Johnston*, 127 F.3d 380, 393-96 (5th Cir. 1997) (holding prosecutor's questioning of law enforcement officials designed to introduce indirectly hearsay testimony of informants and other law enforcement officials constituted "serious prosecutorial misconduct"), *cert. denied sub nom. United States v. Lowery*, 118 S. Ct. 1174 (1998); *Gochicoa v. Johnson*, 118 F.3d 440, 445-46 (5th Cir. 1996) (holding law enforcement official's testimony based on informant's out-of-court statement improperly circumvented hearsay prohibition), *cert. denied*, 118 S. Ct. 1063 (1998); Fed. R. Evid. 803(8)(B) (excluding from "public records" exception to hearsay rule "matters observed by police officers and other law enforcement personnel" in criminal cases); Fed. R. Evid. 803(8) advisory committee's note ("In one respect, however, the rule with respect to evaluative reports under item (c) is very specific: they are admissible only in civil cases and against the government in criminal cases in view of the *almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.*") (emphasis added).

To ascertain whether the admission of the inadmissible evidence was harmless, we must decide, in light of all of the evidence, whether that evidence actually contributed to the jury's verdict.[38] Here, multiple witnesses – coconspirators, law enforcement agents, and third parties – offered testimony concerning Cantu's direction of, and relationship to, the marijuana distribution ring. Given all this evidence, we are satisfied that Agent Wood's conjectural testimony regarding the absence of narcotics evidence at Cantu's residence when it was searched by the police had little, if any, effect on the jury's verdict. Accordingly, the admission of the testimony was harmless error if it was error at all.[39]

D. Forfeiture Issue

1. Standard of Review

We review for abuse of discretion a district court's decision to permit an eleven-member jury to return a verdict after the district court has dismissed the twelfth juror for just cause.[40]

2. Merits

Cantu contends, without citation, that the district court violated Federal Rule of Criminal Procedure 23 when it permitted the jury – consisting as it did of only

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[38] *Dickey*, 102 F.3d at 163.

[39] *See id.*

[40] Fed. R. Crim. P. 23(b); *United States v. O'Brien*, 989 F.2d 983, 986 (5th Cir. 1990).

eleven members following the dismissal of Juror Almaraz – to consider the issue of forfeiture. Rule 23(b) states that juries "shall be of twelve," unless the parties "stipulate in writing with the approval of the court that the jury shall consist of any number less than twelve."[41] The rule further provides, however, that "[e]ven absent such stipulation, if the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict, in the discretion of the court a valid verdict may be returned by the remaining 11 jurors."[42] Cantu asserts that the forfeiture proceedings constituted a "wholly separate trial" from the guilt-innocence stage of the proceedings, and that, because he did not consent to going forward with only eleven jurors, the district court abused its discretion. As Cantu mischaracterizes the nature of the forfeiture proceeding in this case, his assertion is without merit.

Federal Rule of Criminal Procedure 31(e) provides: "If the indictment or the information alleges that an interest or property is subject to criminal forfeiture, a special verdict shall be returned to the extent of the interest or property subject to forfeiture, if any."[43] The Supreme Court has held that "the right to a jury verdict on forfeitability does not fall with the Sixth Amendment's constitutional protection,"[44] so the question whether the district court erred in proceeding with eleven jurors is

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[41] Fed. R. Crim. P. 23(b).

[42] *Id.*

[43] Fed. R. Crim. P. 31(e).

[44] *Libretti v. United States*, 516 U.S. 29, 48 (1995).

simply a matter of statutory construction, not one of constitutional proportions.

Cantu cites no authority in support of his assertion that, because Juror Almaraz was excused, Cantu was entitled to a separate trial before a different jury on the forfeiture issue. As our discussion in *United States v. Cauble*[45] indicates, Rule 31(e) does not require that the forfeiture issue be decided by a separate jury. In addressing the preferred procedure when a special forfeiture verdict is necessary, we stated:

> To ease the jurors' task in determining guilt or innocence, the forfeiture issue should be withheld from them until after they have returned a general verdict. . . . Such a bifurcated trial – *using, of course, only one jury* – is not only convenient for the judge and fairer to the defendant. It also prevents the potential penalty of forfeiture from influencing the jurors' deliberations about guilt or innocence.[46]

Inasmuch as Rule 31(e) does not require that the forfeiture allegations be heard by a separate jury, it follows that the authority to proceed with eleven jurors under Rule 23(b) applies not only to the guilt-innocence phase of Cantu's trial, but also to the special verdict portion of the proceeding. In other words, Rule 31(e) applies to the single trial of which there are two parts – guilt-innocence and forfeiture.[47] Cantu has not challenged on appeal the district court's decision to proceed

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[45] *United States v. Cauble*, 706 F.2d 1322, 1347 (5th Cir. 1983).

[46] *Id.* at 1348 (emphasis added).

[47] Our decision in *United States v. Webster*, 162 F.3d 308 (5th Cir. 1998) is not to the contrary. In *Webster*, we addressed a

to the guilt-innocence verdict with only eleven jurors, and we perceive no error in the district court's permitting that same truncated jury to reach the special verdict on the forfeiture issue as well.

III

CONCLUSION

For the foregoing reasons, the conviction of Javier Lopez Cantu and the judgment of forfeiture are

AFFIRMED.

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district court's authority to replace with an alternate a juror who had been dismissed for cause after the return of the guilt-innocence verdicts and during the separate punishment proceeding. We held that the district court did not have the authority to do so because Fed. R. of Crim. P. 24(c) required the court to dismiss all alternate jurors once the jury "retire[d] to consider" the guilt-innocence verdicts. *Id.* at 347. The present case is distinguishable on two important grounds. First, it concerns the district court's authority under Fed. R. of Crim. P. 23(b) to permit the jury to proceed to a verdict with only eleven jurors, rather than its authority to replace a juror with an alternate. Second, it involves only a brief proceeding to reach a special verdict regarding forfeiture consisting of just one witness, rather than a truly separate trial to determine the defendant's punishment featuring new witnesses and new evidence.

APPENDIX B

United States District Court
Southern District of Texas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(Filed Aug. 1, 1997)
JAVIER LOPEZ CANTU	(For Offenses Committed On or After November 1, 1987)
	Case Number: **1:97CR00020-001**
	Charles Lewis Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____
[ ] pleaded nolo contendere to count(s) _____ _____ which was accepted by the court.

[X] was found guilty on count(s) 1 and 9 on 04/26/97 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. 846	Conspiracy to possess, w/intent to distribute, a quantity exceeding 1000 kilograms of marijuana.	01/29/1997	1
18 U.S.C. 1956(h)	Conspiracy to launder money instruments.	01/29/1997	9

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 2, 3, 7 and 8

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 461-29-6681

Defendant's Date of Birth: 01/17/1967

Defendant's USM No.: 74613-079

Defendant's Residence Address:
2001 East Jackson Street

Brownsville TX 78520

Defendant's Mailing Address:
2001 East Jackson Street

Brownsville TX 78520

07/16/1997
Date of Imposition of Judgment

/s/ Filemon B. Vela
Signature of Judicial Officer

Honorable Filemon B. Vela
United States District Judge
Name & Title of Judicial Officer

8/1/97
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 360 month(s).

This term consists of three hundred sixty (360) months on Count 1. Twenty (20) years on Count 9 to be served concurrently with Count 1 for an aggregate sentence of three hundred sixty (360) months.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[X] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ____ a.m./p.m. on ____.
[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

Five (5) years as to Count 1. Three (3) years as to Count 9 to run concurrently to Count 1 for an aggregate term of five (5) years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[X] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision – Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

14) if restitution has been ordered, the defendant shall make restitution as ordered by the Court and in accordance with the applicable provisions of Title 18 U.S.C. 2248, 2259, 2264, 2327, 3663, 3663A, and/or 3664. The defendant shall also pay the assessment imposed in accordance with Title 18 U.S.C. 3013;

15) the defendant shall notify the U. S. Probation Office of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program, inpatient or outpatient, for the treatment of drug and/or alcohol addiction, dependency or abuse which may include, but not be limited to urine, breath, saliva and skin testing to determine whether the defendant has reverted to the use of drugs and/or alcohol. Further, the defendant shall participate as instructed and as deemed necessary by the

probation officer and shall comply with all rules and regulations of the treatment agency until discharged by the Program Director with the approval of the probation officer. The defendant shall further submit to drug-detection techniques, in addition to those performed by the treatment agency, as directed by the probation officer. The defendant will incur costs associated with such drug/alcohol detection and treatment, based on ability to pay as determined by the probation officer.

The defendant is hereby placed on notice that the court is quite concerned there has been an alarming increase of Driving While Intoxicated and illicit drug violations by persons sentenced by this court to probation or supervised release. Such violations are criminal offenses which would cause mandatory revocation of Probation/Supervised Release and subject to consequences thereof.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 200.00	$ 20,000.00	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement.....

$_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ 0.00.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[X] The court determined that the defendant does not have the ability to pay interest and it is ordered that:

[X] The interest requirement is waived.
[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	** Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [X] in full immediately; or

B [ ] $_____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $_____ over a period of ____ year(s) to commence ____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 42

Criminal History Category: I

Imprisonment Range: 360 to life months

Supervised Release Range: 3 to 5 years

Fine Range: $ 25,000.00 to $ 4,500,000.00

[ ] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[ ] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[X] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

The sentence addresses the severity of the offense and provides just punishment for the offense.

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-40930

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

JAVIER LOPEZ CANTU

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas, Brownsville

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Filed Mar. 2, 1999)

(Opinion 02/03/99, 5 Cir., ___, ___ F.3d ___)

Before SMITH, DUHÉ, and WEINER, Circuit Judges

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members

of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. Wiener Jr.
United States Circuit
Judge